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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. JAMES MAYFIELD,

Petitioner,

v.

LOCKHEED MARTIN ENGINEERING AND SCIENCE SERVICES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err by affirming the entry of summary judgment in favor of a *qui tam* defendant that had obtained a government contract by means of a fraudulent bid, based on a misinterpretation of the False Claims Act and this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)?

2. Can the Government waive or ratify a violation of the False Claims Act by continuing to work with a contractor that obtained a government contract by means of a fraudulent bid?

3. Did the Fifth Circuit err by affirming the entry of summary judgment in favor of a government contractor based on inadmissible evidence of an alleged unwritten agreement to allocate costs under the contract?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case. Patricia Laird was originally a party to this action, but she was dismissed with prejudice by the district court before the prior appeal to the Fifth Circuit and has not participated in the action since.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered in conjunction with the judgment sought to be reviewed is reported at 491 F.3d 254, and is set forth in the Appendix beginning at page A-1. The Amended Opinion on Summary Judgment entered by the United States District Court for the Southern District of Texas, which was affirmed on appeal by the Fifth Circuit, is not reported, but is set forth in the Appendix beginning at page A-18.

An earlier decision by the district court granting the Respondent's first motion for summary judgment is reported at 186 F. Supp. 2d 711. The decision of the Fifth Circuit reversing summary judgment and remanding the case for further proceedings is reported at 336 F.3d 346.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit sought to be reviewed was entered on June 27, 2007. Jurisdiction to review the judgment in question is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Appendix reproduces the relevant text of the False Claims Act, 31 U.S.C. § 3729, beginning at page A-30.

STATEMENT OF THE CASE

Statement Of The Facts

James Mayfield brought this action, as Relator on behalf of the United States of America (the "Government"), against Respondent Lockheed-Martin Engineering and Science Services Company ("Lockheed") under the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. Fundamentally, Mayfield, a former Lockheed employee, alleges that Lockheed obtained a government contract by means of a fraudulent bid, then submitted multiple false or fraudulent claims in connection with the contract, and made multiple false statements to the Government in order to get those claims paid.

Prior to the submission of its false bid on the contract in question, Lockheed provided services to the National Aeronautics and Space Administration ("NASA") under an Engineering Support Contract ("ESC"). The ESC was a level-of-effort contract pursuant to which Lockheed promised to supply labor to NASA for a certain number of hours at a specified rate per hour. While the ESC was in effect, Lockheed executed a lease for Lockheed Plaza Building 4 ("LP4") to house laborers who would provide services to NASA under the ESC. However, because NASA prematurely used up all the hours it had contracted for under the ESC, the contract ended before Lockheed could recover its costs under the lease. Lockheed could have requested to recover its costs of LP4 under the ESC when the contract ended, but never did so.

In 1993, NASA issued a request for proposal ("RFP") for an Engineering, Test and Analysis Contract ("ETA") to replace the ESC. The ETA was also to be a level-of-effort contract pursuant to which NASA would purchase a certain number of labor hours at the best rate possible. The RFP contained an extremely detailed "Scope of Work" provision that contained work similar to what Lockheed had performed under the ESC. Although it knew that it could not supply the labor described in the RFP for the lower cost sought by NASA without substantially cutting costs, Lockheed nevertheless decided to make an offer under the RFP using substantially the same work force it used under the ESC. Determined to obtain the new contract, and recognizing that "low cost [was now] in!" at NASA, Lockheed implemented a "win strategy" for the ETA, part of which involved insuring that Lockheed's "probable cost is at least within 3% of the probable cost of the lowest credible bidder," regardless of Lockheed's actual anticipated cost in performing the ETA.

Lockheed's initial offer in response to the RFP consisted of three volumes—cost, management, and technical. The cost volume included all cost to be charged to NASA under the ETA, including labor rates and facility costs. Mayfield, who was employed by Lockheed as a Project Specialist at the time, initially worked on the cost volume of Lockheed's offer. During the preparation of the cost volume, Mayfield determined that the labor skill mix being proposed did not match the people who would actually be doing the work (the current labor skill mix under the ESC), which effectively understated labor rates. Mayfield

also discovered that facility costs were incomplete as expenses for LP4 were omitted from the offer, even though Lockheed had every intention of fully recouping the cost of LP4 under the new contract. When Mayfield expressed to William Labby and Ben Carroll, two of his superiors at Lockheed, his concern that the cost for labor and facilities was being understated in the offer, he was reassigned to the preparation of the management volume. Labby told Mayfield that after the ETA was awarded to Lockheed, Labby would need people working on the contract who were not "tainted" if and when the accuracy of the cost volume was questioned.

The initial response to the RFP submitted by Lockheed to NASA in July 1993 contained all of the inaccurate figures that Mayfield had discussed with his superiors. In short, in accordance with its win-at-all-costs strategy, Lockheed knowingly underbid the ETA in its offer. Lockheed itself has admitted that it "hedged its bets by bidding the lower cost elicited by the RFP" (A-11), even though it knew that it could not deliver labor under the ETA at the rate specified in its bid. Despite granting Lockheed's motion for summary judgment, even the district court agreed that "[i]t is clear that Lockheed significantly underbid the contract." (A-29.)

In August 1993, NASA narrowed the competition for the ETA down to two suitors—Lockheed and Boeing—at which point NASA requested a Best and Final Offer ("BAFO") from each of them. The BAFO submitted by Lockheed in November 1993 contained an affirmative

misrepresentation by Lockheed that the cost figures included in the BAFO consisted of its "best estimates and/or actual cost." However, the representation contradicted the reality in that Lockheed once again deliberately and substantially understated its cost in the BAFO in order to obtain the ETA from NASA. For instance, Lockheed represented in its BAFO that it would sell to NASA 13,411,995 labor hours at a cost of $425,341,412.20, for a proposed average "wrap rate" over the length of the ETA of $31.71.[1] The proposed wrap rate varied over the course of the contract, with the beginning wrap rate being $30.94. However, at the time Lockheed submitted its BAFO, Lockheed's actual wrap rate was $39.46, or 27.5% more than the rate set forth in its BAFO, meaning that Lockheed underbid the contract by more than $114 million.[2]

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[1]The wrap rate refers to the rate per hour of labor charged by Lockheed. The wrap rate is calculated by dividing the total cost of the contract (excluding incidentals like travel expenses, burdened material, and Lockheed's fee) by the number of man-hours ordered by NASA.

[2]Lockheed also misrepresented its facility costs by omitting from its BAFO any costs related to LP4, even though Lockheed intended to recoup the cost of LP4 under the ETA, even if the spaces were not needed. In fact, during the ETA, Lockheed was never required to provide space for more than the 1,080 persons that it represented in its BAFO that it could house in LP1 and LP2. Although all persons could be housed in LP1 and LP2, Lockheed charged NASA for LP4 anyway, just as Lockheed intended to do all along. Lockheed went so far as to place name plates in LP4 for persons with offices elsewhere, thereby misrepresenting the need for LP4. The district court specifically found that "Lockheed billed [NASA] for the idle capacity in [LP4]." (A-29.)

NASA accepted Lockheed's BAFO without change. Thereafter, at a November 1993 management meeting attended by Mayfield, Labby, Maurice Miller, the ETA Program Manager, Phil Hopkins, the ETA Deputy Program Manager, and Stuart Manville, Lockheed's Business Manager, Labby questioned Lockheed's ability to deliver the services to NASA as bid. Nevertheless, Lockheed made the conscious decision not to cut its costs in order to meet the values bid in its BAFO.

On December 6, 1993, pursuant to the requirements of Federal Acquisition Regulation (FAR) 15.804-4, Lockheed signed a Certification of Current Cost or Pricing Data falsely certifying that the cost and pricing data used to prepare Lockheed's BAFO were accurate, complete, and current as of that date, even though Lockheed knew that its cost and pricing data were, in fact, vastly understated. Based on the misrepresentations made by Lockheed in the BAFO and in the Certification of Current Cost or Pricing Data, NASA entered into the ETA with Lockheed on December 23, 1993. The initial term of the ETA was January 1, 1994 through September 30, 1998. NASA had two options to extend the term of the ETA, first, to September 30, 1999, and, then, to December 31, 2003.[3]

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[3]Before the base period of the ETA ended, Lockheed merged with the Martin Marietta Corporation, which also had an existing large contract with NASA at the time. NASA decided to merge the ETA with the Martin Marietta contract after the base period of the ETA ended because NASA thought there would be some cost savings. Thus, NASA extended the ETA because it was expecting to save cost by merging two separate contracts, not because Lockheed was in compliance with the ETA or meeting

Throughout the contract term, NASA assigned tasks to Lockheed using task orders. Lockheed then organized the work and determined the labor skill mix to perform the assigned tasks. If Lockheed received any task order or instruction that was outside the contract or would increase the cost of the contract, it was required to notify NASA in writing, within five business days.

Lockheed was also required to notify NASA if Lockheed became aware of excessive costs and anticipated a cost overrun under the ETA. The importance of controlling costs was demonstrated by the "Award Fee Plan" attached to the ETA, which explicitly made a significant portion of the fees awarded under the ETA dependent on "Cost Performance Against Contract Value." Furthermore, the payment of any fees was contingent upon compliance with the ETA by Lockheed. Compliance would include but not be limited to charging only costs that were reasonable and allocable to the ETA and properly reporting cost overruns and cost at completion.

Lockheed reported costs to NASA under the ETA using monthly and quarterly "533" financial reports. NASA clearly indicated to all of its contractors, including Lockheed, that it was extremely important that the 533 reports be completed and submitted in a timely and accurate manner and that the reports be based on accurate budgetary data that reflected actual estimates to complete the contracts

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NASA's expectations thereunder.

rather than just restatements of baseline contract data. While he was employed by Lockheed, one of Mayfield's duties was to prepare, based on information provided to him by other Lockheed employees, the 533 reports he submitted to NASA on Lockheed's behalf. Mayfield's immediate supervisor was Manville, who reported to Labby, who reported to Miller.

After the ETA was awarded to Lockheed, Mayfield had discussions with Labby and Miller about the need to cut cost to meet the requirements of the ETA, but was advised that Lockheed would seek relief from the contract rather than cut cost. Mayfield began preparing the initial 533 report in January 1994. During that process, Mayfield met with Miller, Manville, Labby, and Hopkins and told them that the ETA could not be delivered at contract values without cutting cost.

On January 14, 1994, Lockheed submitted to NASA its initial 533 report, the purpose of which was to establish a monthly and yearly fiscal baseline for the ETA based upon negotiated contract values. Since the ETA was based on a bid containing false wrap rates, the baseline figures set forth in the initial 533 report were obviously false, too. The falsity of the bid rates and of the baseline data submitted to NASA in the initial 533 report was quickly confirmed in the very first month of Lockheed's performance under the ETA, when Lockheed began reporting incurred costs in excess of those presented in the initial 533 report. For example, Lockheed's first Cost Self-Evaluation Period, which ran from January 1, 1994 through March 31,

1994, showed a wrap rate of $37.37 per labor hour, or $6.43 above the contract value for that period.

The reason for the higher rate was quite simple—Lockheed performed its obligations under the ETA from day one with a higher skill mix than what it bid in order to obtain the contract from NASA. However, the work assigned by NASA in its task orders did not exceed the work specified in the RFP, and Lockheed never notified NASA that any task order required a higher skill mix than what was contemplated under the ETA. If Lockheed knew that the ETA was going to cost more than the baseline estimates, it was required to reflect the higher cost in its estimates and notify NASA of a cost overrun. But Lockheed never incorporated into the estimates to complete the ETA made in its 533 reports the increased cost of performing NASA's task orders with a higher skill mix than that bid, and NASA never agreed to alter the terms of the ETA to allow for an increased skill mix or a higher wrap rate.

Instead, Lockheed went on submitting false 533 reports using data that did not represent Lockheed's true estimates of the actual wrap rate involved in performing the ETA. Mayfield, who was responsible for signing and submitting the 533 reports, continued to raise the issue as to when a cost overrun for the ETA base period should be reported to NASA at each monthly 533M review meeting through October 1994. Each month, Mayfield was assured by his superiors that Lockheed was working on a cost recovery plan that would recover the overruns by the end of the ETA base period.

Finally, at the November 1994 review meeting, Mayfield stated that the issue of reporting an overrun would have to be addressed by the time the November 533M was produced. During the meeting, Labby, Manville, and Patricia Laird, Contract Administrator, all stated that they shared Mayfield's concerns. Accordingly, Labby directed Carroll to prepare a new baseline budget for the ETA base period that complied with Miller's stated goal of delivering all the target hours in the base period at the negotiated contract value. Nevertheless, Miller assured Mayfield in a December 9, 1994 meeting that he was committed to cutting costs, and thus, that the cost estimates contained in the November 533M report could be achieved. Based on Miller's representations, Mayfield signed and submitted the 533M report for November 1994.

However, the very same concerns arose again in connection with the preparation of the 533Q report for December 1994. In particular, Mayfield was concerned that the future-year estimates for fiscal years 1996, 1997, and 1998 did not make economic sense, were not properly documented, and were just numbers that were mathematically derived, with no basis in fact, in order to meet Miller's objective of delivering all the target hours at the contract rate. In fact, it became clear that the numbers provided to Mayfield to be included in the 533 reports were "fictitious," as Carroll put it. However, Mayfield was once again reassured that the December 533Q contained management's "best estimates" as to Lockheed's costs under the ETA Contract. Nevertheless, Mayfield agreed to sign and submit the December 533Q to NASA only if the

transmittal letter indicated that Lockheed was reestimating future years and might need to submit new estimates in the next quarter.

That process never got off the ground, however, because James Adamson, the new Program Manager who replaced Miller in January of 1995, made it clear to all Lockheed employees involved in the performance of the ETA that anyone who projected the wrap rate in excess of contract values would be terminated. As such, false estimates continued to be used in the December 533M that was delivered by Lockheed to NASA on January 10, 1995. Mayfield was terminated within five weeks of Adamson becoming Program Manager.

Obviously, firing Mayfield did nothing to solve Lockheed's cost overruns. Thus, in its next Cost Self-Evaluation Period (from October 1, 1994 through March 31, 1995), Lockheed tallied figures indicating that its wrap rate was $37.50, or $6.05 above the contract value for that period. Thereafter, Lockheed continued to charge NASA for labor hours at a wrap rate in excess of contract values, resulting in substantial overpayments to Lockheed. Exactly how much NASA overpaid Lockheed is yet to be determined. However, even using the most conservative figures, Lockheed overcharged NASA by at least $62,737,423 for labor alone over the life of the ETA.[4]

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[4]By the end of the ETA, NASA had ordered 13,972,700 labor hours at a cost of $505,751,600, for an actual wrap rate of $36.20 per hour. The average wrap rate bid by Lockheed over the life of

Mayfield subsequently filed this action against Lockheed on behalf of the Government. On February 9, 2006, the district court, ruling on Lockheed's motion for summary judgment, entered its Final Judgment that the Government take nothing from Lockheed. (A-29.) The district court held that, even though the evidence showed that Lockheed had significantly underbid the ETA and charged NASA for idle capacity in LP4, there was no genuine issue of material fact that NASA had "ratified the contract with absolute knowledge of the fraud" and "waived the right to complain about" LP4 by continuing to work with Lockheed. (A-28, A-29.)

On appeal, the Fifth Circuit affirmed the district court's judgment, concluding that Mayfield had not stated a viable fraudulent inducement claim under the FCA in accordance with this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). (A-8 to A-12.) The Fifth Circuit also held that Lockheed's 533 cost projections were not material and, thus, not actionable under the FCA (A-13 to A-15), and that there was no false claim as to LP4 because the parties had struck a deal that NASA would reimburse Lockheed for LP4 if the ETA was awarded to Lockheed (A-15 to A-17).

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the ETA was $31.71, for a difference of $4.49 per hour, and an overcharge of $62,737,423. The higher wrap rate included nearly $11 million for facility costs not allocable to the ETA. Lockheed also received more than $22 million for fees that it never had any right to recover since it was never in compliance with the ETA.

Basis For Federal Jurisdiction

This is a *qui tam* action brought pursuant to the relevant provisions of the FCA, 31 U.S.C. §§ 3729, 3730. Accordingly, jurisdiction in the United States District Court for the Southern District of Texas was proper under 31 U.S.C. § 3732 and 28 U.S.C. § 1331.

ARGUMENT

I. THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION UNDER THE FALSE CLAIMS ACT IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *HESS*.

All of the Government's claims in this case flow from the express language of the FCA, which imposes civil liability on any person who "(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(1), (2). For purposes of the FCA, the term "knowingly" means that a person, with respect to information, "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b).

The FCA was originally adopted in 1863 in order to combat the "rampant fraud" being committed by defense contractors against the Government during the Civil War. *See* S. Rep. No. 99-345, 99th Cong., 2d Sess., at 4, 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5269, 5273; *Rainwater v. United States*, 356 U.S. 590, 592 (1958). Congress's objective in adopting the FCA was "broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made." *Rainwater*, 356 U.S. at 592; *see also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) ("Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."); *accord Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 129 (2003). In light of this broad objective, the Court has always construed "[t]his remedial statute [to] reach[] beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Neifert-White*, 390 U.S. at 233.

The first significant changes to the FCA since its original enactment in 1863 were made in 1986 in light of "[e]vidence [that] fraud in Government programs and procurement is on a steady rise." S. Rep. No. 99-345, 99th Cong., 2d Sess., at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5267. In passing the amending legislation, Congress reiterated that the FCA was the Government's "primary litigative tool for combating fraud," and explicitly noted that the purpose of the reform act was "to enhance the

Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, 99th Cong., 2d Sess., at 1-2, *as reprinted in* 1986 U.S.C.C.A.N. at 5266; *see also id.* at 9, *as reprinted in* 1986 U.S.C.C.A.N. at 5274 ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services."). Thus, since the 1986 amendments were passed, courts have continued to hold that the FCA is violated "not only by a person who makes a false statement or a false record to get the government to pay a claim, but also by one who engages in a fraudulent course of conduct that causes the government to pay a claim for money." *United States v. Inc. Vill. of Island Park*, 888 F. Supp. 419, 439 (E.D.N.Y. 1995); *accord United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 120 (D.D.C. 2003); *United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159, 1168 (S.D. Ind. 1998), *aff'd*, 189 F.3d 542 (7th Cir. 1999); *United States ex rel. Pogue v. Am. Healthcorp, Inc.*, 914 F. Supp. 1507, 1510-11 (M.D. Tenn. 1996); *see also United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 379 (5th Cir. 2004) ("[A] 'false claim' is one grounded in fraud which might result in financial loss to the Government.") (internal quotation omitted); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999) ("[A]ny time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach.").

Because the reach of the FCA is so broad, a submission to the Government need not be an actual invoice to constitute an actionable false claim, record,

or statement under the FCA. *See, e.g., United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 197, 199 (D.C. Cir. 1995) (plaintiff stated valid FCA claim based on defendant's submission of false progress reports about the status of a computer software design project, which induced the Government to pay for various components of the project it would not otherwise have accepted), *cert. denied*, 516 U.S. 1068 (1996); *United States v. Bd. of Educ. of Union City*, 697 F. Supp. 167, 176 (D.N.J. 1988) (plaintiff stated valid FCA claim based on defendant's submission of false progress reports, which were "essential elements in causing the United States to part with its money" given that release of funds was predicated on the periodic submission of accurate reports, even though each individual report did not trigger separate payments under the contract); *United States v. Greenberg*, 237 F. Supp. 439, 443 (S.D.N.Y. 1965) (contractor who submitted false payroll reports in order to receive progress payments under three government construction contracts was liable under the FCA, even though the reports were not themselves requests for payment under the contracts, where the defendant "knew that the payroll reports were an essential element in subjecting the government to a demand for money"). Moreover, it has been the law for more than 60 years that the FCA extends so far as to reach a claim or statement that "is literally true, if the claimant previously made misrepresentations or omissions or committed misconduct in order to induce the government to enter into the contract in the first place." *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 624 (S.D. Tex. 2001) (citing *Hess*); *see also Harrison*, 176 F.3d at 787-88 (FCA

liability extends to claims made pursuant to a contract that was originally obtained through false statements or fraudulent conduct even though "the claims that were submitted were not in and of themselves false") (collecting cases).

This long-standing rule flows inexorably from this Court's decision in *Hess*. There, the Court held that a bid-rigging scheme, in which contractors who are supposed to compete against each other to submit the lowest bid conspire to artificially fix the low bid and the bidder who will be awarded the contract, is a fraudulent course of conduct that can give rise to liability under the FCA as to each claim for payment made under the rigged contract. The bidders employed their scheme in *Hess* to obtain Public Works Administration ("PWA") projects, payment for which was made from a joint construction bank account containing both federal and local funds. Payment was conditioned on the submission of monthly estimates for approval by the PWA. The Court concluded that the respondents' initial fraud in obtaining the contracts through collusive bidding was sufficient to state a claim under the FCA, reasoning that

> The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as

> the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.

317 U.S. at 543-44.

Although this theory of liability under the FCA is derived from the Court's decision in *Hess*, Congress signaled its agreement that the fraudulent inducement of a government contract is a valid ground for imposing liability for a false claim or statement under the FCA when it amended the statute in 1986. In the legislative history accompanying the passage of the 1986 reform act, Congress affirmatively indicated its intent that "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct . . . constitutes a false claim." S. Rep. No. 99-345, 99th Cong., 2d Sess., at 9, *as reprinted in* 1986 U.S.C.C.A.N. at 5274 (citing *Hess*).

Since *Hess* and the 1986 reform act, courts have consistently found FCA violations "in other bid-rigging situations; when a contract was originally obtained

based on false information or fraudulent pricing; or when a contract was obtained by a false representation about the ability to perform the contract." *Harrison*, 176 F.3d at 787-88 (citations omitted; collecting cases).[5] In such cases, FCA liability attaches as to each claim submitted to the Government under the contract that was originally obtained through false statements or fraudulent conduct. *Id.* at 787. As the district court explained in *Wilkins*, "[t]he claims for payment may be accurate, but the antecedent fraud in obtaining the contract makes each claim submitted [under the contract] a false or fraudulent claim." 173 F. Supp. 2d at 621.

In this case, the summary judgment record is more than sufficient to present a triable issue of fact as to the Government's claim against Lockheed under the fraudulent inducement theory adopted by this Court in

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[5]Although this case involves a fraudulent underbid by Lockheed, rather than a collusive bid-rigging scheme as in *Hess*, there is no basis in the text of the FCA for distinguishing between a fraudulently inflated bid and a fraudulently deflated one. *See United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218 (D. Md. 1995). In addition, as the Government has argued in another case, there are "at least two reasons why the Government might reject a low bid if it knew it was fraudulent. First, the Government has an interest in preserving the integrity of the bidding process. Second, a low bid carries the risk of the bidder's default if it wins the contract." *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1327 (D.C. Cir. 2005). Even more fundamentally, there is no cause for treating the two types of fraudulent bids differently for purposes of the FCA where the result of the bid is that the Government was defrauded by being "compelled to contribute more for the . . . work . . . than it [otherwise] would have been required to pay," *Hess*, 317 U.S. at 539 n.1, which is precisely what happened here.

Hess. Despite granting Lockheed's motion for summary judgment, even the district court concluded that the evidence clearly shows that "Lockheed significantly underbid the contract" (A-29), even though it intended to charge NASA its real cost from the very beginning. For example, the record demonstrates that Lockheed employees who worked on the bid were specifically instructed to ignore the skill mix that Lockheed knew it was going to use on the ETA and just bid the skill mix that was necessary to win the contract. Lockheed's attitude throughout the bid-preparation process was that it did not "give a damn" because "there's a difference between proposals and contracts" and Lockheed was prepared to "do whatever it takes in this [ETA] proposal to submit costs where we win; and then, we'll worry about performance later." Under these circumstances, Lockheed's low-ball bid demonstrates, at the very least, a reckless disregard for the truth that amounts to a "knowing" violation of the FCA. *See* 31 U.S.C. § 3729(b).

While the Fifth Circuit paid lip service to the Court's teachings in *Hess*, it nevertheless concluded that Mayfield had failed to make out a fraudulent inducement claim under the FCA because he "ignore[d] the realities involved in projecting labor costs under [Cost Plus Award Fee ("CPAF")]-type contracts. . . . Mayfield's argument is essentially the erroneous proposition that a contractor's FCA liability can arise as a result of the *government's* behavior during the performance of a CPAF-type contract." (A-11 to A-12.) There are, however, two fundamental flaws in the Fifth Circuit's reasoning on this point.

First, the Fifth Circuit's focus on "the government's behavior during the performance" of the ETA is entirely misplaced under *Hess*. *Hess* and its progeny teach that "[t]he false statements or fraudulent conduct originally used to obtain the contract render the ensuing claims for payment false or fraudulent, even if those claims contain no false statements." *Wilkins*, 173 F. Supp. 2d at 631-32. Thus, the focus in determining whether a fraudulent inducement claim is actionable under *Hess* is not on the parties' postcontracting behavior, but on the defendant's fraud in inducing the Government to enter into the contract in the first instance.[6] Here, even the Fifth Circuit acknowledged Lockheed's concession that it had obtained the ETA by "hedg[ing] its bets" in its low-ball bid, despite knowing that it could not actually perform the ETA at the bid price. (A-11.)

Second, the Fifth Circuit is also mistaken in its conclusion that "the structure of the [ETA] itself answers most of the questions in this case." (A-3.) As the Fifth Circuit points out, the ETA was a CPAF-type contract, pursuant to which Lockheed was paid its costs in performing the contract plus fees contingent on its "timely and sound performance" of its obligations. (A-3.) However, the Fifth Circuit mistakenly asserts that, "[b]ecause the precise level of effort and the nature of the work to be done on a CPAF-type contract are, by definition, both unknown

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[6]The extent to which the Government's post-contracting behavior may be relevant as a defense to a prima facie fraudulent inducement claim under *Hess* is considered in Section II of the Argument.

at the outset, neither NASA nor Lockheed knew how much the [ETA's] labor requirements would cost." (A-4.) To the contrary, the RFP was "an encyclopedic document detailing the anticipated scope of work to be performed" under the ETA. (A-2.) Lockheed has admitted that it knew full well when it bid on the ETA that the "Scope of Work statement in the RFP was comparable in breadth to the ESC," and that Lockheed could not do the work described in the RFP for the price it bid without substantially cutting its costs. Moreover, if, in fact, any of NASA's task orders would cause the cost of the contract to be exceeded, then Lockheed was required by the express terms of the ETA to notify NASA of the discrepancy, in writing, within five working days. It is undisputed, however, that Lockheed never gave NASA written notification of any such discrepancy.

In short, contrary to the Fifth Circuit's understanding of the contract, the ETA was designated a level-of-effort contract not because of any uncertainty as to the scope of work to be performed, but solely because the precise number of labor hours that would ultimately be purchased under the contract was unknown.[7] By contrast, the cost of providing those hours—i.e., the wrap rate—was known to Lockheed before the ETA was awarded, but it still chose to bid a

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[7]Lockheed actually agreed in the ETA to supply to NASA 13,411,404 labor hours, *plus or minus 15%*. Lockheed offered no proof in support of its motion for summary judgment that it ever gave written notification that any of NASA's "tinkering with the 'Space-Station Option' and other tasks" (*see* A-11) did not fall within the number of hours Lockheed promised to deliver under the ETA.

lower rate wrap than it intended to use in order to induce NASA to award it the contract. That is the very definition of a fraudulent bid under *Hess* and its progeny, thus making Lockheed liable for every claim for payment submitted under the contract obtained by means of the false bid. Accordingly, the Fifth Circuit erred in holding that Mayfield had not created a genuine issue of material fact as to his fraudulent inducement claim under the FCA. Allowing this decision to go unchallenged changes the law to allow government contractors to misrepresent that they can and will deliver a "Cadillac at Chevrolet prices," to use Lockheed's phrase, despite knowing that they cannot fulfill their false promises. Because this case presents an important federal issue that was decided in a manner at odds with *Hess*, the Court should grant the writ to review the Fifth Circuit's decision. *See Foucha v. Louisiana*, 504 U.S. 71, 75 (1992).

II. THE FIFTH CIRCUIT HAS DECIDED ANOTHER IMPORTANT QUESTION UNDER THE FALSE CLAIMS ACT THAT SHOULD BE SETTLED BY THIS COURT.

The core of the Fifth Circuit's decision plainly lies in its belief that Mayfield's FCA claims are somehow precluded by "the *government's* behavior during the performance" of the ETA. (A-12.) The Fifth Circuit's reasoning presents an important federal question under the FCA, as well as to the performance of all government contracts in general, that should be settled by this Court.

Though avoiding any use of the actual terms "ratification" and "waiver," the Fifth Circuit's decision affirming the district court's entry of summary judgment echoes the district court's opinion that, even though the evidence showed that Lockheed had significantly underbid the ETA and charged NASA for idle capacity in LP4, there was no genuine issue of material fact that NASA had "ratified the contract with absolute knowledge of the fraud" and "waived the right to complain about" LP4 by continuing to work with Lockheed under the ETA. (A-28, A-29). In the words of the district court, NASA had two choices once it learned of Lockheed's fraud: "(a) rescind the contract or (b) waive the fraud by either negotiating an adjustment or ignoring it. NASA chose the latter." (A-28 to A-29.)

The lower court's reasoning is, however, extremely problematic for several reasons. First, NASA could not, as a matter of law, have waived the rights of the United States under the FCA. In general, "[a] violation of the rights of the United States may not be waived or ratified by the unauthorized acts of its agents." *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 771 (N.D. Tex. 2002); *see also Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); *Ferguson v. FDIC*, 164 F.3d 894, 899 (5th Cir.) (affirming summary judgment that defendant's affirmative defenses of waiver and ratification were

not available against the United States where its employee acted outside the scope of his authority), *cert. denied*, 528 U.S. 819 (1999). The Department of Justice ("DOJ") is the only governmental body that has the authority to waive or compromise the rights of the United States under the FCA. *See Cushman & Wakefield*, 275 F. Supp. 2d at 771 (granting motion to strike affirmative defenses that contractor's fraud had been waived and/or ratified by the United States Postal Service because the United States was suing to enforce its rights under the FCA, not those of the USPS); 28 U.S.C. § 516 (reserving to the DOJ "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested"); 31 U.S.C § 3730(a) (civil actions under the FCA are brought by the Attorney General); 28 C.F.R. § 0.45(d) (reserving to the DOJ "civil claims arising from fraud on the Government . . . , including alleged claims under the False Claims Act"). Thus, no NASA officer or agent could have waived or compromised the right of the United States to proceed against Lockheed under the FCA. *See also United States v. Nat'l Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956) ("[W]e do not believe that the Congress ever intended that contracting officers should have the power to vitiate the False Claims statute."), *cert. denied*, 353 U.S. 930 (1957).

The Fifth Circuit's holding that Mayfield's FCA claims were vitiated by NASA's postcontracting behavior also seems to raise an important issue as to the proper scope of the so-called "government knowledge" defense. Other courts have held that, since the FCA was amended in 1986 to remove

language expressly providing for a government knowledge defense,[8] "government knowledge of a contractor's wrongdoing is no longer an automatic defense to an FCA action." *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000) (citing *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense.")); *accord United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1156 (2d Cir.) ("[W]e agree with *Hagood* that the statutory basis for an FCA claim is the defendant's knowledge of the falsity of its claim, *see* § 3729(a) & (b), which is not automatically exonerated by any overlapping knowledge by government officials."), *cert. denied*, 508 U.S. 973 (1993). Rather, to make out the defense, the defendant must establish that "the government's knowledge of or cooperation with a contractor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA." *Shaw*, 213 F.3d at 534. For example, where the defendant follows the government's "explicit directions" in submitting particular claims for payment, *see United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d

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[8]Prior to 1986, the FCA provided that "[t]he court shall have no jurisdiction to proceed with any [FCA] suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C) (1976) (repealed), *quoted in Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000).

284, 288-89 (4th Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003); *Durcholz*, 189 F.3d at 543, the government's participation may rise to a level showing "that the contract has been modified or that its intent has been clarified," such that the claims submitted by the contractor at the government's behest are no longer "false," *Kreindler*, 985 F.2d at 1157. Thus, "'[i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim.'" *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (quoting *Durcholz*, 189 F.3d at 545).

However, government knowledge is not an effective defense under the FCA if that knowledge is "incomplete or acquired too late in the process." *Durcholz*, 189 F.3d at 545; *accord Southland*, 326 F.3d at 682 n.9; *see also Shaw*, 213 F.3d at 535 (government knowledge defense did not apply where government employees were unaware that any work orders had been falsely inflated by the contractor); *Kreindler*, 985 F.2d at 1157 ("The fact that a contractor has fully disclosed all information to the government may show that the contractor has not 'knowingly' submitted a false claim[.]"). The Fifth Circuit has itself indicated that "full" disclosure occurs only when the Government has been informed "of the falsity of the statement and was willing to pay anyway." *Southland*, 326 F.3d at 682; *see also id.* at 682 n.9 ("[T]he government's knowledge of a false claim would not be an effective defense if the person making the false statement did not know that the government knew it was false").

In addition, the Government's level of cooperation in the submission of the false claim must reach beyond "mere acquiescence (rather than approval) . . . [which] would preclude FCA liability any time a government employee and a defendant were in cahoots." *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 730 (N.D. Ill. 2007) (citing *Durcholz*); *see also Southland*, 326 F.3d at 682 n.9 (government knowledge defense does not apply if the claimant was colluding with the government employee to submit a false claim). As the Fourth Circuit has explained, there are good reasons why the Government

> might choose to continue funding the contract despite earlier wrongdoing by the contractor. For example, the contract might be so advantageous to the government that the particular governmental entity would rather not contest the false statement, even if it became aware of the false statement before the subcontractor began its work. Also, the government might decide not to address a conflict of interest that it first discovers several months after the subcontractor begins work. At that point, to avoid further costs the government might want the subcontractor to continue the project rather than terminate the contract and start over.

United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 917 (4th Cir. 2003). If the Government was faced in every case with the choice posited by the district court between rescinding a contract that had been somehow tainted with fraud or continuing the contract and thereby waiving any right to recover for the fraud under the FCA, the consequences might well be disastrous for the field of government contracts as a whole, as demonstrated by the outcome of this case.

Here, it is undisputed that Lockheed never told NASA of its fraudulent underbid or of the falsity of the cost projections contained in its 533 reports. Indeed, Lockheed repeatedly told NASA, in its 533s and otherwise, that it would complete the contract at the bid price. Thus, NASA did not "know and approve of the particulars" of any statement or claim for payment made by Lockheed with full knowledge of Lockheed's duplicity. Moreover, while the Fifth Circuit seems to suggest that there cannot be a false claim if the parties demonstrate some cooperation in working together under a "CPAF-type" or level-of-effort contract, it is also undisputed that the parties never modified the ETA.[9] In fact, the summary judgment record plainly demonstrates that NASA steadfastly refused to give Lockheed any relief from its obligation to perform the contract as bid. In sum, while government knowledge of *all* the circumstances surrounding a claim for

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[9]The Fifth Circuit did find that the parties had reached a separate agreement allowing Lockheed to bill NASA for LP4 under the ETA. That aspect of the court's opinion is addressed in Section III of the Argument.

payment can negate the basis for viewing a claim as "false" in some circumstances, the Fifth Circuit's opinion goes far beyond any decision of its sister circuits in holding that the Government's knowledge that one of its contracts is running over budget, coupled with a decision not to terminate the contract at that juncture, constitutes a ratification or waiver of the contractor's prior fraud, such that the Government cannot recover for that fraud under the FCA. In light of the far-reaching implications of the Fifth Circuit's decision under the FCA, and for government contracts in general, the Court should take this opportunity to clarify the law in this important area.

III. THE FIFTH CIRCUIT'S DECISION AFFIRMING SUMMARY JUDGMENT AS TO LP4 BASED SOLELY ON INADMISSIBLE EVIDENCE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Although it is undisputed that Lockheed billed NASA for the idle capacity in LP4 (*see supra* note 2), the Fifth Circuit affirmed the district court's entry of summary judgment as to LP4 based on evidence concerning an unwritten agreement pursuant to which NASA purportedly agreed that it "would reimburse Lockheed for the LP4 lease under the [ETA] if it was awarded to Lockheed." (A-16.) However, the supposedly "unchallenged facts" supporting the existence of such an agreement consisted of testimony

by Mayfield as to what other people, who also were not party to the agreement, had told him concerning the alleged understanding. In other words, the Fifth Circuit based its decision almost entirely on hearsay upon hearsay, which is not competent summary judgment evidence.[10] *See, e.g., Noviello v. City of Boston*, 398 F.3d 76, 84 (1st Cir. 2005); *see also* Fed. R. Civ. P. 56(e) (affidavits supporting and opposing summary judgment must set forth "such facts as would be admissible in evidence").

Moreover, Lockheed's hearsay evidence, contrary to being "unchallenged," was directly contradicted by the undisputed testimony of Laura Pepper, one of NASA's contracting officers, that NASA was not expecting to be charged for LP4 and did not know that it was being charged for LP4 but had to "dig" to find the charge later. As discussed in section II of the Argument, the fact that Lockheed buried the charges for LP4 in claims presented *before* NASA subsequently decided to allow the charges for nine months, for reasons that Pepper could not recall, negates the Fifth Circuit's conclusion that there was

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[10]The Fifth Circuit also cites as evidence of this alleged "understanding" another hearsay statement in which Lockheed self-servingly noted that it would continue to incur and estimate facilities cost in excess of the contract values "pursuant to oral guidance during the negotiation." (A-16.) However, evidence of any such "oral guidance" that is inconsistent with the express terms of the later executed ETA on facilities cost, which NASA expressly refused to renegotiate, is barred by the parol evidence rule. *See, e.g., Cruzan by Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) (the parol evidence rule prevents the variation of the terms of a written contract by oral testimony).

no false claim as to LP4 because NASA "kn[e]w[] and approved of the particulars of the claim" before it was presented. (A-17 (citing *Durcholz*, 189 F.3d at 545).) As such, the Fifth Circuit erred in finding that Mayfield had not created a genuine fact issue on the question of whether Lockheed's claims for the LP4 lease were knowing or false. (A-17.) The Fifth Circuit's decision to the contrary, based solely on inadmissible evidence, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

In light of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

UNITED STATES OF AMERICA ex rel. JAMES MAYFIELD,

Petitioner,

v.

LOCKHEED MARTIN ENGINEERING AND SCIENCE SERVICES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20225

United States of America, ex rel;
PATRICIA LAIRD; ET AL,

Plaintiffs,

United States of America, ex rel;
JAMES MAYFIELD,

Plaintiff-Appellant,

versus

LOCKHEED MARTIN ENGINEERING
& SCIENCE SERVICES CO.

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

Before JONES, Chief Judge, and HIGGINBOTHAM, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

In this *qui tam* action challenging Lockheed's performance of a government contract, the plaintiff, James Mayfield, appeals from the district court's grant of Lockheed Martin's motion for summary judgment. We affirm.

I

In 1993 Lockheed bid on an Evaluation, Testing, and Analysis contract, a research-and-development project of NASA. The research contract followed on the heels of an Engineering Support Contract, for which Lockheed had been the dominant contractor since 1987.[1]

Lockheed's bid for the research contract responded to NASA's Request for Proposal, an encyclopedic document detailing the anticipated scope of work to be performed. The RFP described a hypothetical workforce designed by NASA that it required bidders to use to calculate their bids. NASA projected a need for 13,411,404 man-hours—give or take 15%—to complete the research contract's projected tasks. It is undisputed that those tasks required less–skilled labor and lower staffing levels than Lockheed used for the engineering contract. The research contract's base term was to run from January 1994 through September 1998, with a contract value

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[1]NASA terminated the engineering contract ahead of schedule because it had consumed the labor hours it purchased. If Lockheed's bid succeeded, it might be able to dovetail its preexisting engineering contract work structure at the Johnson Space Center into production for the potentially lucrative research contract.

during that period of roughly $510,187,031. Lockheed won the contract. Its Best-and-Final-Offer, in government contracting parlance BAFO, promised 13,411,995 labor hours at a cost of $425,341,412.

As we will explain, the structure of the research contract itself answers most of the questions in this case. It was a cost-plus-award-fee ("CPAF") contract. According to the Federal Acquisition Regulations, under a CPAF a contractor is paid a base fee fixed at the inception of the contract, plus an award fee.[2] The award is based on the government's unilateral evaluation of the contractor's performance at regular intervals, adjusted in accordance with the work performed under the contract, a compensation arrangement designed to enhance incentive for timely and sound performance.[3]

The research contract provided this incentive through its "Award-Fee Plan," NASA's periodic evaluation of the quality of Lockheed's technical work and the project's actual costs in relation to the contract's value. The research contract provided that Lockheed might earn an award fee of as much as $31,667,248 over the life of the contract. The actual fee was to be calculated at ten fee-evaluation periods and paid out in semi-annual installments.

The award paid in any given period was discretionary and determined by NASA. NASA

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[2] *See* FAR §§ 16.305, 16.405.2(a).

[3] *Id.* § 16.405-2(a).

evaluated Lockheed's performance under a 100-point system that corresponded to the maximum allowable award fee available in a period. Lockheed's "cost performance" with respect to contract value constituted 30 grading points; the other 70 points were awarded for technical performance. An overall score of 60 or below was a "failing" grade, in which case Lockheed would receive no award in that period. The research contract's base fixed-fee amount was zero: if Lockheed failed each award period, it earned nothing.

The research contract's Award-Fee Plan was not the only variable in the contract. Because the precise level of effort and the nature of the work to be done on a CPAF-type contract are, by definition, both unknown at the outset, neither NASA nor Lockheed knew how much the research contract's labor requirements would cost.[4] For example, NASA considered—and ultimately rejected—exercising the RFP's "Space-Station Option," which would have transitioned Lockheed's existing engineering contract projects into research contract projects. Prior to signing the research contract with Lockheed, NASA demurred on the space station, instead instructing Lockheed to finish the engineering contract's space-station-related tasks, but to charge the hours to the research contract. This agreement was representative of many uncertainties inherent in the structure of the research contract and, says

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[4]The only immutable limitation was the research contract's "Limitation of Funds" clause, which provided that costs would be limited according to the constraints of the NASA budgetary process. Both parties anticipated, correctly, that NASA's funding amount would increase yearly. See FAR § 16.306(b)(1) (CPAF contracts are appropriate in open-ended R&D-type situations).

Lockheed, is why the research contract was overbudget from the start.

Appellant and *qui tam* relator James Mayfield was a Specialist at Lockheed responsible for preparing the cost estimates for the research contract project. Lockheed reported its accrued costs and anticipated future costs to NASA monthly and quarterly using "533" forms. Mayfield was concerned that the "wrap rate"[5] projections reported to NASA in the 533s greatly underestimated the actual cost of labor needed to fulfill the research contract task assignments.

Mayfield's concern was not unfounded. Early on, Lockheed failed to meet its baseline projections, incurring cost overruns of 13.7% and 18.1% in the first two evaluation periods. NASA and Lockheed both took steps to remedy the situation: Lockheed revised the skill mixes it applied to certain tasks and laid off workers, and NASA ordered Lockheed to submit a "Cost-Recovery Program" that would bring the

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[5]A "wrap rate" is calculated by dividing the total cost of the contract (excluding incidentals like travel, fees, and burdened material) by the number of man-hours ordered by NASA. The figures reported by Lockheed in its BAFO provided for 13,411,995 labor hours at a cost of $425,341,412.20, yielding a wrap rate of $31.71/hour. Mayfield alleges that that submission, *inter alia*, is a false claim because at the time Lockheed knew that the actual wrap rate needed to perform under the research contract was actually $39.46/hour—27.5% higher than the bid wrap rate, meaning that Lockheed underbid the research contract by around $114 million.

research contract's costs back to Earth.[6] Mayfield questioned the accuracy of several 533s and was eventually fired in February 1995.

He responded by bringing a wrongful-discharge action in Texas state court, which granted summary judgment for Lockheed in 1996. The Texas Court of Appeals subsequently affirmed.[7] This suit, filed in the Southern District of Texas, followed. The district court granted summary judgment for Lockheed, holding that the wrongful-discharge judgment was a *res-judicata* bar to some of Mayfield's *qui tam* claims and that his remaining claims were barred by the False Claims Act's "original source" rule.[8]

This court reversed, holding that *res judicata* was not a bar and that Mayfield was an independent source of the cost information at issue.[9] On remand

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[6]It seems that NASA's practice was to renegotiate the contract and allow for an increase in the total contract value. NASA, however, refused to renegotiate the research contract's baseline costs, instead ordering Lockheed to tighten its belt.

[7]*See Mayfield v. Lockheed Eng'g & Sci. Co.*, 970 S.W.2d 185 (Tex. App. 1998) [hereinafter "*Mayfield I*"].

[8]*See United States ex rel. Mayfield v. Lockheed Martin Eng'g & Sci. Co.*, 186 F. Supp. 2d 711 (S.D. Tex. 2002); *see* 31 U.S.C. § 3730(e)(4) (disallowing federal jurisdiction in any false-claims action based upon public disclosure of the transactions in a civil dispute unless the action is brought by the "original source" of the information).

[9]*See United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346 (5th Cir. 2003) [hereinafter "*Mayfield II*"].

the district court in a careful opinion granted summary judgment in favor of Lockheed, ruling that: (1) there was no evidence that Lockheed submitted a false bid within the meaning of the FCA; (2) the parties had established a post-contract relationship that precluded FCA liability; (3) Lockheed's 533 cost projections were neither false nor material and therefore not false claims; and (4) NASA ratified Lockheed's facilities overcharges.

Mayfield appeals, arguing that Lockheed swindled the United States out of $22,491,500 in award fees and $10,902,978 in illicit facilities costs, totaling $33,394,478 in damages, swelled by the FCA's treble-damages provision to $100,183,434.[10] Mayfield asserts that Lockheed made false claims in its submission of (1) the bid, (2) the 533s, and (3) the claims for certain rental costs. Mayfield has standing to bring all three claims.[11] We address each in turn.

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[10]31 U.S.C. § 3729(a)(7).

[11]The Supreme Court's recent opinion in *Rockwell International v. United States*, No. 05-1272 (Mar. 27, 2007), held that the statutory phrase "information on which the allegations are based" refers to the information on which the relator's allegations are based rather than the information on which the publicly disclosed allegations are based. The Court rejected "contrary conclusion of some lower courts," citing our prior decision in this case. *United States ex rel. Laird v. Lockheed Martin Eng. & Scis. Servs. Co.*, 336 F.3d 346, 354 (5th Cir . 2003). Although *Rockwell* overrules our prior precedent, Mayfield has standing nevertheless. It is plain from the record and the parties' concessions at oral argument that Mayfield has direct and independent knowledge of the information on which the allegations are based.

II

Mayfield first attacks Lockheed's underbid as an actionable "false bid" because "Lockheed knew from day one that it could not deliver the hours under the contract for the amount represented in its BAFO." He argues that Lockheed's allegedly knowing misrepresentation in the BAFO was a fraudulent act rendering each subsequent claim for payment made by Lockheed during Mayfield's employment a false claim within the meaning of the FCA. Lockheed responds that Mayfield has produced no evidence to suggest that the BAFO was fraudulent, and explains that the cost overruns resulted from NASA's mid-contract alterations of the research contract's task assignments.

The FCA imposes civil liability on any person who "knowingly presents . . . to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" or "knowingly makes [or] uses . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government."[12] In statutory terms, Mayfield's argument is that submission of the BAFO to NASA constituted the fraudulent presentment of a claim under section 3729(a)(1), and that Lockheed subsequently used the 533 forms completed pursuant to the research contract to fraudulently obtain award fees in violation of section 3729(a)(2).

Mayfield's argument that Lockheed intentionally undervalued the BAFO is essentially a

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[12]31 U.S.C. § 3729(a)(1)-(2).

fraud-in-the-inducement claim. The archetypal fraud-in-the-inducement case is *United States ex rel. Marcus v. Hess*,[13] in which the Supreme Court held that FCA liability was triggered when contractors colluded to inflate artificially the bid price on a public-works project, thereby inducing the government to pay more than it otherwise would have.[14] Even though the contractor's subsequent claims for payment made under the contract were not literally false, since they derived from the original fraudulent misrepresentation, they, too, became actionable false claims.[15]

Hess stands for the proposition that, to succeed on a fraud-in-the-inducement theory under the FCA, Mayfield must prove (1) that Lockheed had no intention to perform the research contract according to the terms of the BAFO; and (2) that Lockheed obtained payments under the research contract to which it was

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[13]317 U.S. 537, 63 S. Ct. 379 (1943).

[14] *Cf. United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995) (submission of false progress reports about the status of a computer project fraudulently induced the government to pay for extraneous components).

[15]*See Hess*, 317 U.S. at 543-44, 63 S. Ct. at 384. ("This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal--payment of government money to persons who had caused it to be defrauded.").

not legitimately entitled.[16] Mayfield has not created a genuine issue of material fact as to either element.

Without more, a contract underbid is not a false claim.[17] For FCA liability, there must be a nexus between the underbid and a request for payment that the contractor would not have been entitled to absent the contract.[18] That nexus is absent here.

The record shows, and Mayfield doesn't deny, that the research contract was doomed to run over-budget from the start. The terms of the RFP required that all bidders design their proposals using the hypothetical skill mix NASA demanded and, accordingly, Lockheed's projected labor costs were derived from NASA's model. The research contract mandated roughly equivalent projects to those included in the engineering contract, but included a lower skill mix. Put otherwise, the research contract was designed in part to accomplish the same tasks as the engineering contract using lower-cost, lower-skilled labor. Lockheed willingly complied with these optimistic—perhaps unrealistic—requirements and submitted a bargain-basement-priced bid. Lockheed

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[16]*See United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 384 (5th Cir. 2003); *see also United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1325 (D.C. Cir. 2005).

[17]*See Chicago Coll. of Osteopathic Med. v. George A. Fuller, Co.*, 719 F.2d 1335, 1347-48 (7th Cir. 1983).

[18]*See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787-88 (4th Cir. 1999).

concedes that it "hedged its bets by bidding the lower cost elicited by the RFP."

Mayfield infers incorrectly from this admission that Lockheed "underbid the [research contract] even though it intended to charge NASA its real cost from the very beginning." This statement—and Mayfield's entire theory of fraud-in-the-inducement liability—ignores the realities involved in projecting labor costs under CPAF-type contracts. Under contracts like the research contract, labor requirements over the life of the contract are determined by the government, not the contractor.[19] The central purpose of a CPAF-type contract is to afford the government flexibility in requisitioning labor in an unpredictable environment.[20]

The inherent variability in the research contract's structure was reflected by Lockheed and NASA's joint behavior. On the one hand, Lockheed's low projected labor costs were quickly outstripped by the actual skill mixes required to perform research contract tasks; on the other, NASA's tinkering with the Space-Station Option and other tasks requiring highly skilled workers exacerbated Lockheed's cost overruns. Indeed, NASA admitted in a Cost Performance Evaluation that 40% of the initial cost overruns were "government directed." Mayfield's argument is

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[19] *See* FAR § 16.306(b)(2); *Bettis*, 393 F.3d at 1325.

[20] *See* FAR § 16.301-2 ("[C]ost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.").

essentially the erroneous proposition that a contractor's FCA liability can arise as a result of the *government's* behavior during the performance of a CPAF-type contract. This assertion is antithetical to fraud and not surprisingly lacks support in the caselaw.

Neither can Mayfield demonstrate that Lockheed used the research contract to dupe NASA out of payments that it could not have obtained absent the contract. This case is unlike *United States ex rel. Mayman v. Martin Marietta Corp.*,[21] where an intentional underbid allowed the contractor to recoup the shortfall on the contract value via a separate R&D agreement with the government unrelated to the original contract. This "intent to recover additional monies above the contract price" was the key to the court's finding of FCA liability.[22]

Here, in contrast, there are no analogous extra-contractual payments Mayfield can point to indicating that Lockheed finagled fees it had no right to under the research contract. The payments Lockheed received were exclusively research contract-based, a product of the contract's Award-Fee Plan.

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[21]894 F. Supp. 218 (D.Md. 1995).

[22]*Bettis*, 297 F. Supp.2d at 282 n.17; *see also Schwedt*, 59 F.3d at 199 (fraudulent progress reports induced government to purchase programs it otherwise would have declined).

III

Nor are the 533 cost projections actionable. Mayfield argues that even if Lockheed's RFP bid was not a knowing misrepresentation of its intent to perform, Lockheed still fraudulently manipulated the data reported in the 533 forms so that the research contract cost projections would meet NASA's targeted cost at completion. This argument fails because there is no nexus between the 533s and Lockheed's award fees, as the 533s were only cost projections that did not independently entitle Lockheed to award payments under the research contract's fee-award system. In short, the 533s were immaterial.

The civil False Claims Act "interdicts *material* misrepresentations made to qualify for government privileges or services."[23] No majority decision of this circuit has addressed the proper standard for assessing the materiality of a false statement under the FCA's civil-liability provisions, although at least five judges of this court suggested that false statements, in order to be material, must "actually affect" the government's decision to pay.[24] The United

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[23] *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir.1997) (emphasis added); *see also United States v. Southland Management Corp.*, 326 F.3d 669, 679 n.3 (5th Cir. 2003) (Jones, J., concurring); *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F.Supp.2d 601, 618-30 (S.D.Tex.2001) (Rosenthal, J.); *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (Breyer, C.J.).

[24] *United States v. Southland Management Corp.*, 326 F.3d 669, 679 n.3 (5th Cir. 2003) (Jones, J., concurring).

States as amicus urges a different standard, suggesting that a material statement need only have "potentially affected" the decision to pay.

Under either standard, the 533 cost projections are immaterial here. The 533 projections were not submitted nor used for the purpose of calculating Lockheed's award fee payment, rather, by their terms they were for planning purposes only. The NASA contracting officers testified accordingly, explaining that the award fee is based only on Lockheed's meeting contractual requirements, which is determined solely by NASA, looking only to Lockheed's past performance, not to their cost projections. Indeed, the research contract itself provides that the 533 projections are non-binding.

Mayfield insists that the 533 projections were material to Lockheed's award. He directs us to the deposition of Gail Skowron, who, he says, testified that incorrect 533 projections would affect Lockheed's award fee "to some degree." This overstates Skowron's testimony. Skowron did not testify that the 533 projections were material to the award fee. Rather, she merely acknowledged that Lockheed had a contractual duty to provide these 533 projections, and that Lockheed's failure to provide accurate projections might be characterized as non-compliance with a contract term. Such non-compliance, Mayfield argues, was material to the award fee.

Mayfield has lost sight of his target. There is no allegation before us that Lockheed lied about whether it was in compliance with the contract, a lie that would

have been material to the fee award, or so its seems. Instead, Mayfield alleges that Lockheed lied in its 533 cost projections. It is undisputed that these cost projections could not have affected (or potentially affected) Lockheed's award fee. NASA independently reviewed Lockheed's progress and unilaterally determined the fee Lockheed earned during a given period independent from the cost projections Lockheed submitted on the 533s. The 533s were planning tools that predicted future performance. They reflected cost overruns that were built into the research contract from the start. Viewed in the best light for Mayfield, the evidence suggests that the 533 reports were negligent miscalculations of the true labor requirements demanded by the research contract. Unreasonable or incorrect cost projections, however, cannot fend off summary judgment.[25] Neither the original bid nor the 533s were actionable false claims.

IV

Mayfield's remaining theory is that for nine months Lockheed billed NASA for an office building, LP4, that was not contemplated by the research contract, concealing from NASA the fact that LP4 was actually excess capacity. The alleged overpayments total $10,902,978.

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[25]*See United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326 (9th Cir. 1995) (later modifications in derogation of original contract demands might allow a breach-of-contract claim, but do not give rise to FCA liability); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) (negligent misrepresentations or systems errors are not actionable false statements under the FCA).

LP4 was a building leased by Lockheed under the old engineering contract. The government terminated the engineering contract before its expiration date as it was a level-of-effort contract that had exhausted the allocated hours before the contract period ended. With this early ending Lockheed was stuck with the building because it had leased LP4 for the entire term of the contract. At that point, since this was a termination of convenience, Lockheed could have claimed reimbursement for the remaining lease period as well as other charges. Instead, as Mayfield himself testified, the Lockheed chairman struck a deal with the Deputy Director of the Johnson Space Center. The Deputy Director agreed that NASA would reimburse Lockheed for the LP4 lease under the research contract if it was awarded to Lockheed. Indeed, in its very first bill, Lockheed pointed out the LP4 deal, noting that "pursuant to oral guidance during the negotiation," we are billing in excess of costs.

Under these unchallenged facts, Lockheed did not "knowingly" present a "false" claim.[26] Most of our sister circuits have recognized that "[w]here the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises."[27] Or, stated more broadly, "[i]f the

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[26]31 U.S.C. § 3729(a)(1); 31 U.S.C. § 3729(b).

[27]*Southland Management Corp.*, 326 F.3d at 682; *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 288-89 (4th Cir.2002); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019–20 (7th Cir.1999); *United*

government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim."[28]

Nor is Mayfield alleging collusion between a government agency and a contractor.[29] According to his own testimony, Mayfield's claim is based on a separate agreement negotiated between the chairman of Lockheed and a high-ranking government official, an agreement not made to enrich Lockheed at the expense of the taxpayer, but, in essence, for the satisfaction of a debt. Any fallout from this agreement is a matter caught by contract law, not the punitive provisions of the FCA. Mayfield has not created a genuine fact issue on the question of whether Lockheed's claims for the LP4 lease were knowing or false. Nor has he done so for the bid and 533s. The judgment of the district court is

AFFIRMED.

States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 326-27 (9th Cir.1995).

[28]*United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 545 (7th Cir.1999).

[29]*See Southland Management Corp.*, 326 F.3d at 682 n.8; *Lamers*, 168 F.3d 1013 at 1019–20.

UNITED STATES DISTRICT COURT		SOUTHERN DISTRICT OF TEXAS
JAMES MAYFIELD, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
versus	§	Civil Action H-04-483
	§	
LOCKHEED MARTIN ENGINEERING AND SCIENCE SERVICES CO.,	§	
	§	
	§	
Defendants.	§	

Amended Opinion on Summary Judgment

1. *Introduction.*

Acting as a representative of the United States, a man sues a governmental contractor. He says that the contractor fraudulently procured its contract and then based on the initial fraud asked for and accepted payments. Both sides have moved for summary judgment. The contractor will prevail.

2. *Background.*

In 1993, NASA solicited bids for what it called the Evaluating, Testing and Analysis Contract. It replaced the Engineering Support Contract of 1987, on which Lockheed Martin Engineering and Sciences Company had been the primary contractor for about six years. The 1993 contract, like its predecessor, was

a "level of effort" contract. Under this arrangement, the contractor promises to supply labor for a specific number of hours, rather than a particular product. To allow contractors to prepare bids, NASA gave them (a) the hours needed—13,411,404 over five years, plus or minus 15%, (b) an abstract and lengthy description of work, and (c) a staffing model. Lockheed wanted the contract and, arguably, was favored because its labor force was in place at NASA. When preparing the bid, Lockheed found that, although the work seemed comparable to the prior contract, the proposed mix of labor skills was lower. Because the contractor did not know how or if this apparent underestimation would become manifest in the actual task orders, it admits that it "hedged its bets," using the proposed workforce for its estimate.

Lockheed won the bid, and on December 23, 1993, the parties executed the contract. The initial term was January 1, 1994, through September 30, 1998. NASA could extend the term for one year and, then, an additional four.

Throughout the contract term, NASA assigned tasks, and Lockheed selected and organized the work and workers to perform them. Lockheed was entitled to reimbursement of all reasonable and allowable costs, including labor, materials, and facilities. Although the contract included a space where NASA could have designated ceiling costs—making expenditures in excess of that amount unallowable—no ceilings were specified.

NASA required that Lockheed submit monthly financial reports. The reports included the actual hours worked and costs incurred, plus short-term projections of the hours and cost to complete the contract. In a separate form, Lockheed requested reimbursement.

Lockheed's profit was derived from discretionary "performance awards." An independent board of NASA technical and administrative personnel awarded the fees based on a 100 point scale. Up to 30 points were awarded for cost performance and 70 for technical performance. The final score equaled the percentage of the available fee—listed in the contract—that was awarded to Lockheed. A cumulative score under 60 precluded Lockheed from any award for that period. Lockheed could request reconsideration, but it could not appeal NASA's final determination. The initial fee was based on the first three-month period of the contract. It was followed by nine periods of six-months.

Within the first three months of the contract, Lockheed and NASA both knew that costs were higher than those projected in the bid—by 13.7%. Lockheed says the technical demands in the tasks NASA ordered exceeded those estimated in the solicitation, requiring a more skilled—and costly—workforce. In the first evaluation, primarily because of the cost levels, NASA paid only 76% of the available award. In June, it required Lockheed to prepare and submit a written "cost recovery program"—a plan to align costs with the bid. (Jt. Ex. 206; Ex. 16 to Parten Dep.) By the second evaluation, increasing costs contributed to a zero award fee—a loss to Lockheed of $3.5 million in

potential income. Meanwhile, however, NASA praised Lockheed's technical performance. In fact, some at NASA argued against demanding lower costs because they believed that it would compromise Lockheed's technical performance. (Welch Dep. 129:3-11)

The recovery program was effective. By the third evaluation, the board noted improvements. In 1994, Lockheed laid off workers to reduce labor costs. (Jt. Ex. 263) In 1998, NASA extended the contract, and the parties converted it to a "completion form contract." NASA then evaluated overall cost performance, rather than each labor hour. With less NASA participation in management, Lockheed decided how to accomplish tasks, and costs decreased. Although Lockheed's hourly costs remained above the baseline, the aggregate was below. NASA maintained the contract, and it eventually renewed the contract a second time for a total extension of five years.

3. *Claim.*

In 1996, James Mayfield—a former Lockheed employee—sued Lockheed for wrongful discharge. He argued that Lockheed fired him for complaining about what he perceived to be inaccurate information in reports to NASA. The trial court held that even if what Mayfield said was true, he had no claim under Texas law, and it granted summary judgment for Lockheed. The decision was appealed and affirmed. *Mayfield v. Lockheed Eng'g & Seis. Co.*, 970 S.W.2d 185 (Tex.App. – Houston [14th Dist.] 1998, *pet. denied*).

Now, Mayfield brings this action for the government under the False Claims Act. He says that Lockheed submitted a false bid to win the contract when it knew that actual costs would be much higher. The fraud was a bid lower than Lockheed could reasonably anticipate its cost to do the work. He asserts that because the bid was fraudulent, each claim for payment was a false demand.

Also, Mayfield independently accuses Lockheed of charging the government for rent on an office building that was not contemplated in the offer.

4. *Jurisdiction.*

From January 1994 through March 1995, Mayfield prepared and executed Lockheed's cost reports to NASA. In his wrongful discharge suit, he alleged that Lockheed fired him for complaining about erroneous projections in those reports. The disclosures in that case simply added to what Mayfield had been complaining about. He brings this lawsuit for fraud that he believes began while he worked at Lockheed and continued after he was fired.

Because Mayfield had direct and independent knowledge of the facts reported in his case of 1996, this court had jurisdiction to hear the qui tam suit based on that information. U.S. ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346, 354 (5th Cir. 2003).

5. *Fraudulent Bid.*

Mayfield asserts that Lockheed fraudulently secured the contract with a false bid. He then argues that every claim for reimbursement is a false claim because it exceeded that original estimate. He misunderstands the law.

The False Claims Act imposes liability on a person who:

> (1) knowingly presents. . . . to an officer or employee of the United States Government . . . . a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes . . . . a false record or statement to get a false . . . claim paid or approved by the Government . . .

31 U.S.C. §3729.

Here, Mayfield does not dispute the authenticity of the actual costs that comprised the bid. Instead, he asserts that liability attaches to each claim submitted under the fraudulently procured contract.

In support of his theory, Mayfield refers to decisions that are missing at least two critical facts found here: (a) an inherently uncertain contract and (b) ratification by the government. See *U.S. v. Hess*, 317 U.S. 537 (1943)(holding that collusive bidding produced false claims), *Harrison v. Westinghouse Savannah River Co.*, 176 F. 3d 776 (4th Cir.

1999)(holding that a contractor's categorical lies about the benefit to the government in sub-contracting work could make each claim for reimbursement illegal).

Lockheed's bid was derived from the application of its hourly rates to the workforce suggested by NASA—the workforce NASA demanded that bidders use in their proposals. In practice, however, the work that NASA assigned required more skilled labor than there was in the bid solicitation. NASA workers, as well as Mayfield, admit that the work was the same complexity as the previous contract. (Mayfield Dep. 83:4-9, May 18, 2004)

Mayfield says that Lockheed had a duty to tell NASA if the task orders required work that was not contemplated in the bid or proposal. It, he says, should not have done the work at a higher expense without notifying NASA. Assuming that Lockheed was obliged to notify NASA that its requests exceeded its own proposal, Lockheed's late notice would generate a claim for breach of contract—not fraud. Regardless, Lockheed did notify NASA; it reported costs monthly. In turn, NASA evaluated efficiency, demanded change, and withheld portions of Lockheed's fee. NASA paid every claim for costs, and it awarded fees for cost and technical efficiency in all but one evaluation period.

NASA admits that it, too, was responsible for unexpected costs. NASA frequently ordered more hours than the baseline. It also added a significant project. The contract originally purposed a space-station option. Just before the parties signed the agreement, however, NASA decided not exercise the

option. By then, Lockheed was already working on space-station tasks and asked how to proceed. NASA directed Lockheed to complete the tasks, yet it never reinstated the option or revised the hours allocated on the contract.

Through the contract, the parties established a relationship—a system of working together. Neither the tasks to be done nor the time and skill that would be required could be specified. Based on these inherent uncertainties, the parties engaged in a constant dialogue about tasks and time—about productivity and costs. *See* 48 CFR § 16.301-2(1993) ("cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.") This type of relational contract precludes well-defined obligations and requires nontraditional supervision mechanisms. *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981). NASA knew this and, therefore, controlled Lockheed's revenues and closely supervised progress through individual task orders and frequent reports. There simply is no evidence suggesting that the government was duped.

6. *Overrun Prediction.*

Next, Mayfield says that even if Lockheed did not fraudulently bid, it should have reported the early overages and extrapolated them over the life of the contract in the monthly reports. Instead, he says, Lockheed manipulated reported "target hours" and

"cost at completion" to meet the contract. He says that the contract mandated accurate reporting, and that Lockheed impliedly certified that it was in compliance when it accepted the fees. This, he says, is a violation of the law.

Lockheed initially estimated the cost at completion by subtracting the current costs from the contract value. Around September 1994—after the second evaluation—NASA demanded that Lockheed actually calculate its best estimate of the cost to complete the contract. It also required a supplemental financial report. By January 1995, several corrections were made, and Mayfield reported to NASA that the estimates were accurate. Lockheed also initiated an investigation by its internal auditors that concluded that the reports were commercially reasonable.

Mayfield argues that these discussions prove that NASA was not accepting the overruns. It actually proves the opposite, and it defeats his allegations of fraud. By the end of the third period, although costs were still high, NASA acknowledged "the notable improvement in cost performance experienced during this period as a result of the cost control measures implemented by [Lockheed]." (Jt. Ex. 287) When the parties converted and extended the contract in 1998, they talked more about costs. The record is replete with candid correspondence and testimony about NASA's displeasure with the situation. NASA had the numbers, and it continued to reimburse the costs and pay the fees. Regardless of the reported estimates to complete the contract, NASA knew that costs were higher than the original prediction, and it cared only

about effective completion—not deviations from the initial or adjusted estimate.

Fraud must be predicated on a present material fact. The *estimates* were a planning tool, not a claim or demand. (Ex. 271 at 3-10, noting that the reports were not binding on the contractor or NASA) Lockheed's awards were not contingent on the estimates. The interim cost projections were not material, nor were they presented as fact. *U.S. v. Southland Mgmt. Corp.*, 326 F.3d 669 (5th Cir. 2003)(en banc); *S. Sur. Co. v. Adams*, 34 S.W.2d 789,791 (Tex. 1930). They cannot be the basis of liability.

7. *Office Building.*

The contract contemplated that Lockheed would use two office buildings—Lockheed Plaza 1 and 2. For nine months, however, Lockheed used and billed NASA for Lockheed Plaza 4. Mayfield says that Lockheed represented that these payments were covered or proper under the contract, concealing from NASA that the space was excess capacity. Again, his claim is negated by NASA's knowledge of the actual nature of the claims for payment.

Mayfield argues that NASA did not know about Plaza 4. The record demonstrates otherwise. (Jt. Ex. 206) NASA paid for Plaza 4 for the first six months of the contract. In June 1994, it told Lockheed that it would stop paying in September. If NASA had been ignorant or deceived into compensating Lockheed, it could not have discussed it with Lockheed much less

have given Lockheed three months to make other arrangements.

Also, NASA ended the previous contract before the scheduled termination. Lockheed disputed the decision, particularly because it had leased Plaza 4 for the full term. The evidence suggests that the parties struck a deal. In return for Lockheed foregoing a claim that NASA terminated the contract for its convenience--making it liable for costs—NASA agreed to take care of the building costs if Lockheed was awarded the follow-up contract. (Mayfield Dep. 71:2-73:21, May 18, 2004).

The contracting officer permitted the expense, and then later changed her mind. (Jt. Ex. 206) Mayfield's disapproval of her decision does not make it illegal. Again, his claims fail.

8. *Ratification and Waiver.*

Lockheed worked as the prime contractor for NASA on the contract of 1987. Following that six and one-half year relationship, NASA awarded it the next contract of 1993. The relationship continued for a decade.

There is no evidence that Lockheed submitted a false bid. Assuming that it did, NASA ratified the contract with absolute knowledge of the fraud. NASA knew the bid, it knew the tasks, and it knew the labor costs. NASA regularly reviewed Lockheed's expenses and evaluated its performance. In response, it had two choices: (a) rescind the contract or (b) waive the fraud

by either negotiating an adjustment or ignoring it. NASA chose the latter.

The government also waived the right to complain about Plaza 4. The record shows that it knew about the building, paid for it, and then stopped. Rational people do not offer to continue paying as debts something that they believe that they are being cheated out of—neither did NASA.

The contract states that, in 1998, NASA will exercise the extension only if "performance has met the government's expectations." (Jt. Ex. 2) NASA did, therefore, it is precluded from assessing liability now.

9. *Conclusion.*

It is clear that Lockheed significantly underbid the contract. Still, Mayfield has no claim. NASA knew that the work in the 1993 contract would be similar to that of the previous contract, yet it requested a lower skilled workforce. It also knew that Lockheed consistently exceeded the projected costs. Likewise, NASA knew that Lockheed billed it for the idle capacity in Plaza 4. Still, it continued the contract. It cannot now claim—through Mayfield—that the contract was procured or sustained through fraud. The government will take nothing from Lockheed.

Signed February 9, 2006, at Houston, Texas.

s/Lynn N. Hughes
Lynn N. Hughes
United States District Judge

The False Claims Act—31 U.S.C. § 3729

§ 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property

used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.